

CORPORATIONS AND THE STATES

It is a common notion, that incorporation in one State gives powers and rights in other States. This is a mistake, due to the legal fiction, that by incorporation an artificial person is created, or rather to a misunderstanding or misuse of this fiction. The development of the law owes much to this fiction; its usefulness is not ended; it should not yet be thrown away. But, unfortunately, its use cannot be confined to those who know its character and will not confuse fiction and fact.

Incorporation, in the language of fiction, creates an artificial being; but, in fact, it creates nothing. Obviously, legislation, the mere say-so of the legislature, cannot create; it can only regulate. If a charter of incorporation is given to any body of men, nothing whatever immediately results; results come only from what the men do because of it. The charter simply gives a privilege—the privilege of doing business under peculiar legal conditions. It becomes effective only through the acceptance and use of the privileges by this body of men.

Error as to the fundamentals of corporation law will often be avoided, if, whenever the question arises, "What is a corporation?" there be substituted this question, "What is incorporation?" Incorporation is a privilege given by the State. It is given to persons associated together. It is the privilege of doing business under this condition, that the acts or omissions of the association shall not be regarded in law as the acts or omissions of the persons composing it. The association is legally personified. No new person is, in fact, created; but the association of persons is to be viewed in law as if it were a distinct person. This is what is meant when it is said that "a corporation is an artificial being, invisible, intangible and existing only in contemplation of law." This is the language of fiction. It is only in contemplation of law, that is, in the realm of legal fiction, that any artificial being exists by reason of incorporation. The fact is that nothing is thereby created, but an association of persons is given a privilege, that of being regarded as if it were itself a person, distinct from its members.

Manifestly, a privilege given by the legislature of any State can be operative only within the State's domain. The laws of New Jer-

sey, for instance, have force only within the limits of that State; they are not law in any other State. An association of persons by acquiring the privilege of incorporation from one State acquires no such privilege in any other State. A like privilege may be acquired by the same association in several States, but in each State the privilege rests upon the consent of that State. Each State is in full control within its own borders, decides for itself whether such privilege shall be granted, to whom it shall be granted, and upon what terms and conditions. One State is powerless to give any such privilege to be effective in any other State.

This thought is expressed in the language of fiction as follows:—
“A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence.” (*Bank of Augusta v. Earle*, 13 Pet. 519.) This does not mean that a body of men having obtained the privilege of incorporation in New Jersey may not obtain and enjoy a like privilege in New York; but only that a grant of incorporation from a State can operate only within its boundaries. In each State in which such privilege is acquired, the language of fiction may be used and it may be said that there results an artificial being created by the law; but in each State it is the law of that State alone on which the privilege rests and which, in the language of fiction, is the source of the life of such artificial being within its boundaries.

Clearly, then, a State has equal power, with respect to the imposition of conditions, liabilities and duties, when it grants the privileges of incorporation, whether its grant is to an association not yet incorporated anywhere, or to one already incorporated in another State. To speak more according to common parlance, each State is unrestricted as to the conditions, liabilities and duties which it may impose when it admits a foreign corporation to do business as a corporation in like manner as when it creates a domestic corporation. An association incorporated in New Jersey has no right to do business as a corporation in New York unless by the consent of New York; and such consent may be withheld or may be granted upon any conditions.

In earlier times, the statutes of the States were silent as to the rights, within their boundaries, of companies incorporated elsewhere. The Courts recognized that the privilege of incorporation in any State must be grounded upon the assent of that State; but, in the absence of any express word, found evidence of assent in favor of corporations of other States in a presumption based upon inter-

state comity. The effect was that, practically, incorporation in one State, so long as the States said nothing to the contrary, secured to a company a like privilege in all the States. But even then the privilege in each State rested on the assent of that State—an assent presumed, though not expressed.

Later, the States began to deal with this subject expressly. And now the right of a company to do business as a corporation in States other than that of original incorporation is regulated by statute, almost without exception; such right being obtainable only in the manner and upon the conditions expressly prescribed by law.

It is obvious that a State may make any requirements it chooses as conditions of incorporation under its laws. It is equally true, that it may impose any conditions upon its assent to the admission within its boundaries of a company incorporated elsewhere. Indeed, there is nothing to prevent any State from putting corporations originally incorporated elsewhere in substantially the same position as domestic corporations with respect to all legal relations within its domain. And this has been done in more than one State, notably in Illinois and in Colorado, where the purpose of the law has been judicially declared to be "to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character and bring them all under the influence of the same law."

If the fiction of the creation of an artificial being or legal entity is not permitted to mislead, it is easy to see that there need be no substantial distinction between foreign and domestic companies with respect to the power of control of each State within its bounds. If it be borne in mind that incorporation simply gives a privilege to a body of men, and that such privilege given by one State cannot operate in another, it is clear that the privilege may be made subject to conditions, including the power to regulate the enjoyment of it, in like manner, whether such body of men has elsewhere been given a like privilege or not, or, in other words, whether the corporation is foreign or domestic.

One obvious conclusion is, that the argument that national control of corporations is necessary because a State is powerless as to corporations of other States doing business within its boundaries, rests upon a purely fictitious foundation.

Thomas Thacher.